

**Rule 2, Ariz. R. Crim. P.**

**PRETRIAL ALLEGATIONS FOR SENTENCING ENHANCEMENT — Timing of  
allegations in non-death penalty cases .....Revised 12/2009**

When the State alleges prior convictions, the Rules of Criminal Procedure require that the priors be alleged no later than 20 days before trial, unless the trial court directs some other date. Rule 16.1(b), Ariz. R. Crim. P. And Rule 13.5(a), Ariz. R. Crim. P., provides that

The prosecutor may amend an indictment, information or complaint to add an allegation of one or more prior convictions or other noncapital sentencing allegations that must be found by a jury within the time limits of Rule 16.1(b).

However, A.R.S. § 13-704(L) provides that the trial court "shall allow" an allegation of prior conviction or allegation of "dangerousness" to be made "at any time prior to the date the case is actually tried unless the allegation is filed fewer than twenty days before the case is actually tried and the court finds on the record that the defendant was in fact prejudiced by the untimely filing and states the reasons for these findings." Additionally, A.R.S. § 13-901.03(A) provides the same conditions for adding allegations of "violent" to the charge.

In *State v. Fowler*, 137 Ariz. 381, 384, 670 P.2d 1205, 1208 (App. 1983), the Court of Appeals explained that "untimely filing of the motion does not preclude the prior conviction from being alleged. It merely shifts from the prosecutor to the trial court the discretion of permitting the allegation." In *State v. Williams*, 144 Ariz. 433, 442, 698 P.2d 678, 687 (1985), after the jury verdict of guilt but before the trial on the sentencing, the State moved to amend its allegation of two prior convictions "by dropping one prior and adding a different one in its place." *Id.* The trial court allowed the amendment and on

appeal, the defendant claimed that the trial court erred in doing so since the motion was untimely under Rules 13.5(a) and 16.1(b), Ariz. R. Crim. P. The Arizona Supreme Court explained that Rule 13.5(a) simply provides for "the period in which the allegation of a prior conviction is solely within the discretion of the prosecutor." *Id.* The Court explained the type of "prejudice" required to block an amendment to allege a prior conviction:

We have stated that a defendant is not prejudiced by noncompliance with [former] A.R.S. § 13-604(K) [now § 13-704(L)] provided he is on notice before trial that the prosecution intends to seek the enhanced punishment provisions of the statute. *State v. Barrett*, 132 Ariz. 88, 89, 644 P.2d 242, 243 (1982); see *State v. Hadd*, 127 Ariz. 270, 277-78, 619 P.2d 1047, 1054-55 (App.1980). Here petitioner had timely notice of the prosecutor's intent to use prior convictions to seek enhanced punishment. Two prior felony convictions were timely alleged; the post-verdict amendment substituted a third felony for one of the previously alleged felonies. The substitution was improper under [former] A.R.S. § 13-604(K), but petitioner suffered no prejudice since there was adequate pre-verdict notice.

*Id. but see State v. Sammons*, 156 Ariz. 51, 54-55, 749 P.2d 1372, 1375-76 (1988) (holding that the trial judge's refusal to allow amendment of allegation of parole status was not an abuse of discretion where the amendment was proposed after trial, conviction, and sentencing hearings for prior convictions, *Hannah* priors, dangerousness, and one attempt to prove parole status).